87-257

Supreme Court, U.S.
FILED
AUG 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

EDGARD MARTINEZ

Petitioner,

v.

LYDIA LIZARRIBAR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

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Petitioner - Pro Se

August, 1987

Questions Presented

1. When and to what extent do the rights and obligations of residents of a jurisdiction cease if they both move to another jurisdiction with different rights and obligations.

2. Does the Full Faith and Credit Clause protect a decision by a Virginia court with jurisdiction over the parties and subject matter that is challenged in Puerto Rico and reversed by the Puerto Rico courts.

3. What are the obligations imposed on courts under the Due Process Clause and the rights under the Writ of Habeas Corpus when resolving issues relating to child support.

4. Can a court order the incarceration of a citizen for civil contempt when it is at that time impossible for the citizen

to comply with the conditions imposed by the court, and the court arbitrarily refuses to accept any other form of compliance of its orders.

5. Can a court require or coerce third parties to pay monies for the release from prison of the party involved when it is impossible for the party in interest to comply with the court's order.

6. Can a party relitigate a controversy in contravention of the doctrines of collateral estoppel and res adjudicata and the Full Faith and Credit Clause and the Due Process Clause of the United States Constitution.

Parties Below

The parties below were Lydia Lizarribar and Edgard Martinez.

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IN THE SUPREME COURT OF THE UNITED STATES

LYDIA LIZARRIBAR

Plaintiff - Respondent

v.

CIVIL ACTION NUM.

87 -

EDGARD MARTINEZ

CERTIORARI

Defendant - Petitioner

PETITION

Comes now petitioner, pro se, and respectfully avers and prays that a writ of certiorari issue to review the decision of the Supreme Court of Puerto Rico of May 21, 1987.

OPINIONS BELOW

The Supreme Court of Puerto Rico denied petitioner's Petition for Certiorari of the decision of the trial court, the Superior Court of Puerto Rico, San Juan Division, which denied petitioner's motion for summary judgment.

The trial court's decision is unreported as is the decision by the Puerto Rico Supreme Court.

JURISDICTION

The Supreme Court of Puerto Rico's denial of review was issued May 21, 1987. This court has jurisdiction under 28 U.S.C. Section 1258. This court has jurisdiction also under Article III of the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The violation of three provisions of the United States Constitution form the basis of this petition for certiorari: Full Faith and Credit Clause, Due Process Clause, and Writ of Habeas Corpus of the United States Constitution. The Full Faith and Credit Clause of the United States Constitution, Article IV, Section 1 of the Constitution, provides as follows:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The Due Process Clause, Fifth Amendment, of the United States Constitution provides as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases of arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice of jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Writ of Habeas Corpus is

provided for in the United States Constitution, Article I, Section 9, Clause 2, as follows:

> "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

STATEMENT OF THE CASE

In 1975 the parties were divorced in Puerto Rico. There were two children in the marriage. Respondent was granted custody of the children and petitioner was granted visitation rights. The divorce decree provided, pursuant to the intent of the parties, that petitioner pay alimony to respondent. Petitioner voluntarily provided additional substantial sums for the children until such time as respondent repeatedly violated his right to visitation and the enjoyment of a relationship with his two children.

In 1979 both parties established permanent residency in the State of Virginia. Respondent moved the daughter with her to Virginia and left the son living with respondent's parents in Puerto Rico, notwithstanding the requests made by petitioner to have his son live with him in Virginia.

In 1980 respondent sued petitioner in the Virginia courts alleging that petitioner was delinquent in child support payments under the divorce decree of the court of the Commonwealth of Puerto Rico from approximately July of 1979 through 1980.

Petitioner presented various defenses and counter allegations. Among these defenses and counter allegations were the fact that respondent was depriving petitioner of his visitation rights and had left the son living with

respondent's parents to deprive petitioner of his rights to enjoy a relationship with the children. Under Virginia law, this latter action would preclude respondent from obtaining child support.

The judge in Virginia noted that at the time of the hearing the son was living with petitioner in Virginia, and the daughter was living with respondent in Virginia. The trial judge in Virginia dismissed the case ruling that under the divorce decree of Puerto Rico respondent was granted alimony, not child support, and that her right to alimony had been terminated as a matter of law due to respondent's subsequent marriage. Additionally, the evidence reflected that both respondent and petitioner were employed as attorneys and had comparable, if not identical, incomes and were

equally responsible for the support of each child.

The trial judge in Virginia also ruled that respondent could commence a new support petition with the Court of Virginia. Respondent, within an hour, proceeded to commence said new child support action but later dismissed the same. Respondent did not appeal the adverse judgment regarding the fact that the divorce decree called for alimony and not child support. The judgment became final thereafter.

In 1984, respondent, by then a citizen of the Commonwealth of Puerto Rico, commenced a second action in Virginia alleging again that petitioner was in arrears in child support payments under the divorce decree of Puerto Rico. Respondent again alleged that petitioner was delinquent for the period included in

the prior Virginia judgment in 1980, and thereafter.

Again petitioner responded to the new allegations, as well as the previously adjudicated allegations. Among other defenses, petitioner raised the defenses of collateral estoppel and res adjudicata. The case was dismissed on the merits again. Again, respondent did not appeal the adverse judgment. This second judgment also became final.

On March 16, 1986, petitioner traveled to Puerto Rico on a temporary job assignment. During the trip he was summarily incarcerated, because respondent alleged that petitioner owed in excess of $20,000 in child support under the 1975 Puerto Rico divorce decree.

On March 20, 1986, petitioner was served a notice to appear within one and

one half hours before the trial court in Puerto Rico to show cause why he should not be held in civil contempt for allegedly not complying with provisions of the divorce decree from that same court of Puerto Rico. Although the divorce decree stated, pursuant to the original intent of the parties, that petitioner agreed to pay alimony, the trial court in Puerto Rico, at the urging of respondent, chose to interpret the decree as requiring child support. This issue was adjudicated twice by the courts of Virginia in 1980 and in 1984. The trial court in Virginia interpreted the divorce decree to mean alimony to which respondent was not entitled.

The summary incarceration occurred notwithstanding the fact that petitioner, who was on a temporary job assignment in Puerto Rico, called the trial court judge

and notified him of the short notice and inability to adequately prepare himself, that he was on a work assignment, and that he was willing to appear at a future date to raise his defenses, particularly the existence of prior judgments between the parties on the same matter before a court of Virginia with jurisdiction over the parties and subject matter. The trial court in Puerto Rico denied petitioner's requests and petitioner was incarcerated that same night, and thereafter for a total of sixteen days until ordered released by the Supreme Court of Puerto Rico. Petitioner's release from prison was conditioned upon the payment of $7,000 by third parties.

During the sixteen days of the incarceration the trial court of Puerto Rico refused to issue a ruling on its

order for incarceration so that petitioner's counsel could file an appeal before the Supreme Court of Puerto Rico. Petitioner was not permitted to file a Writ of Habeas Corpus, because the Supreme Court of Puerto Rico held in a prior decision that the Writ of Habeas Corpus was not applicable in Puerto Rico in cases in which a person was incarcerated for civil contempt stemming from proceedings involving child support payments and that only a certiorari proceeding could be used to ascertain rights arising from civil contempt incarcerations.

During his incarceration, petitioner was allowed to appear before the trial court. The trial court continuously demanded the full payment of the allegedly owed child support as a condition for release from prison. In

addition, the trial court indicated that no judgments contrary to the court's understanding of, and the laws of Puerto Rico, would be recognized, regardless of the United States Constitution. The judge from Virginia was available for a telephone conference call as to the validity and finality of the Virginia judgments and the trial court judge refused to accept the call for the stated reason.

The trial court judge stated that judgments by a State Court of Virginia are not entitled to the protection of the Full Faith and Credit Clause of the United States Constitution even though the judgments of Virginia were issued by a court with jurisdiction over the parties and subject matter and uncontroverted, authenticated copies of the judgments were admitted into evidence

by the trial court in Puerto Rico. If permitted to proceed, the trial court will deny petitioner his constitutional rights by permitting respondent to select yet another convenient forum to adjudicate her claims after two unsuccessful attempts in Virginia on the same cause of action and same set of facts.

Petitioner filed a motion for summary judgment alleging his rights under the Full Faith and Credit Clause of the United States Constitution and the Due Process Clause. The suspension of right to file a Writ of Habeas Corpus in cases involving child support had already been decided by the Supreme Court of Puerto Rico. Additionally, petitioner brought forward other claims and rebuttals to respondent's opposition to the motion of summary judgment. Some will be discussed

later.

The proceedings before the trial court in Puerto Rico resulted in the summary incarceration of petitioner from March 20 to April 6, 1986, notwithstanding the uncontroverted proof of the existence of judgments from a State Court in Virginia in 1980 and in 1984, holding that the decree was for alimony and not child support. Petitioner was ordered incarcerated until he could, prior to any hearing, pay to the court all of the alleged monies owed. Petitioner repeatedly asserted his rights, including the fact that he was without the financial means to pay the required sums. The trial judge stated in open court on various occasions that the judgments from Virginia did not exist, and if they did, he would not honor them because they were contrary to his

understanding of the laws of Puerto Rico. These views became part of the judgment issued by the trial court in Puerto Rico denying petitoner's request for summary judgment.

Furthermore, the judgment of the trial court of Puerto Rico totally ignores most, if not all, of petitioner's defenses, counter allegations, and rebuttals. The court ignored the requirements of Virginia regarding dismissals or nonsuits that were brought to its attention. Virginia law only permits one dismissal without prejudice. Even assuming arguendo as respondent asserts, that she withdrew the 1980 action, Virginia requires that she recommence her action within six months. Respondent failed to recommence her action within six months in 1980, because her case was dismissed on the merits.

Her only recourse was an appeal which she failed to pursue. Thus, the trial court in Puerto Rico also ignored that in Virginia after a matter is adjudicated and dismissed, withdrawal is impossible as respondent asserts. Instead, respondent filed the same cause of action in Virginia in 1984 which was also dismissed.

The March 16, 1987, order of the Puerto Rico trial court attributed fraud to petitioner's translation adopted by the court of Virginia. The Puerto Rico trial court totally ignored the fact that the court of Virginia was notified that the proffered translation was performed by petitioner and that respondent received a copy of this translation and proffer well in advance of the hearing before the court of Virginia in 1980. The Puerto Rico trial court also ignores

that respondent submitted her own uncertified translation to the Virginia court which was not adopted by the court.

The Puerto Rico trial court ignores the fact that petitioner submitted yet a third translation made in Puerto Rico by a court certified interpreter during his incarceration in 1986. This court certified interpreter also translated the 1975 divorce decree to require the payment of alimony. The Puerto Rico trial court ignores the fact that during the 1986 proceeding in Puerto Rico respondent profferred a six year old translation of the 1975 divorce decree clearly obtained one week after the 1980 adjudication in Virginia. The inference to be drawn from respondent's action in obtaining a court certified interpretation after the 1980 adjudication in Virginia is that

respondent understood the finality and adjudication of the controversy and was deliberating an appeal, a right respondent knew she had since she was an attorney and member of the bar.

The Puerto Rico trial court ignores the fact that on its face the judgment of Virginia adjudicated the controversy over child support or alimony and the fact that other proceedings consonant to this adjudication may have been commenced and dismissed. The court ignores the fact that respondent has not presented any proof to the effect that the controversy was not adjudicated in Virginia except by her assertions through pleadings. The court ignores the second adverse judgment on the merits by the court of Virginia and the respondent's failure to appeal. The court ignores the fact that respondent was a resident of Virginia at

the time of the judgments and that she was subject to the rights and obligations established by the laws of Virginia. The laws of Virginia allowed the court, at the least, to terminate any child support obligation resulting from the actions or inactions of respondent and the fact that each parent had physical custody of one child and had similar incomes. Other allegations were also ignored by the court.

Federal Questions Raised

Petitioner raised the first federal question in this case by moving for summary judgment and relying, inter alia, on the Full Faith and Credit Clause of the United States Constitution, Article IV, Section 1. Although Petitioner raised Full Faith and Credit as the basis for his motion for summary judgment and thoroughly briefed the issue, the trial

court did not address or even acknowledge the issue of Full Faith and Credit in its order of March 16, 1987. Moreover, the trial court did not acknowledge the existence of two prior final judgments from the courts of Virginia adjudicating the same issues in its order of March 16, 1987. On appeal from the trial court's dismissal of petitioner's motion for summary judgment, the Supreme Court of Puerto Rico denied certiorari on May 21, 1987.

Petitioner relied on United States Supreme Court cases in his motion for summary judgment in asserting the applicability of the Full Faith and Credit Clause to the instant set of facts. In the case of Milliken v. Meyer, 311 U.S. 457, 462 (1940), the U.S. Supreme Court stated:

"But if the judgment on its fact

> appears to be a 'record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.'....In such case the Full Faith and Credit Clause of the Constitution precludes any inquiry into the merits of the cause of action the logic and consistency of the decision, or the validity of the legal principles on which the judgment is based...Whatever mistakes of law may underlie the judgment...it is conclusive as to all the media concludendi.'"

Under the Full Faith and Credit Clause, the trial court was obligated to recognize the October 21, 1980, and October 4, 1984 judgments of Virginia which fully and completely adjudicated the claims of the parties. Under the Full Faith and Credit Clause, the judgments of the courts of a state must be accorded the same Full Faith and Credit in other states. Morris v. Jones, 329 U.S. 545, 547 (1947).

In Morris, the U.S. Supreme Court stated that "...full faith and credit is a more inexorable command; its applicability does not turn on a balance of convenience as between litigants." Respondent's statement on the trial court record, nonetheless, was to the effect that she "...can direct her efforts to vindicate and validate her rights in any manner, within the law, that is most prudent and convenient." This is precisely what respondent has done by filing three separate suits on the same cause of action between 1980 and 1986.

Petitioner asserts that the judgments of Virginia dated October 21, 1980, and October 4, 1984 are correct and entitled to the full force and effect of the law. The 1980 judgment from Virginia was a judgment on the merits. In 1984, respondent's action was dismissed on the

merits for her failure to respond to a court order requiring her sworn response to petitioner's answer. Respondent failed to appeal either judgment in Virginia. Thus, both judgments became final, and petitioner is entitled to rely on those judgments and not face yet a third lawsuit involving the same facts in yet another jurisdiction. Even if for any reason the 1980 and 1984 Virginia judgments can be found to be in error, the United States Supreme Court has held that a state must honor the judgments of another state pursuant to the Full Faith and Credit Clause even if the judgment was in error. Fauntleroy v. Lum, 210 U.S. 230 (1908); Williams v. North Carolina, 317 U.S. 287 (1942); and Titus v. Wallick, 306 U.S. 282 (1938).

In Sutton v. Leib, 342 U.S. 402 (1952) and Barber v. Barber, 323 U.S. 76

(1944), the U.S. Supreme Court held that a judgment between the parties is not subject to a collateral attack. In Barber, the U.S. Supreme Court stated that "Neither the full faith and credit clause of the Constitution nor the Act of Congress implementing it says anything about final judgments or, for that matter, about any judgments. Both require that full faith and credit be given to 'judicial proceeding' without limitation as to finality." Not only is respondent estopped from relitigating the 1980 and 1984 Virginia judgments, she is estopped from relitigating all issues that should have been brought to the court's attention at that time. Angel v. Bullington, 330 U.S. 183, 186 (1946). In Angel, the U.S. Supreme Court held:

> After an adverse decision against Bullington on a cause of action...Bullington

> wants to start all over in another North Carolina court...The doctrine of res judicata is a barrier against it. Litigation is the means for vindicating rights, but it may also involve unwarranted friction and waste...Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion....And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties.

See also Heiser v. Woodruff, 327 U.S. 726, 735 (1945); and Union Land Bank v. Byerly, 310 U.S. 1 (1939).

Petitioner raised the second and third federal questions in this case by his incarceration for civil contempt and the requirement that third parties post $7,000 for petitioner's release from prison, both of which violate the Writ of Habeas Corpus and the Due Process Clause. On March 20, 1986, petitioner was incarcerated without a hearing and

without a sworn statement by respondent to the contested facts. In fact, the record reflects the trial court in Puerto Rico postponed the hearing. However, during meetings off the record the decision was made to issue a bench warrant for petitioner's arrest. Petitioner was incarcerated for sixteen (16) days before the Supreme Court of Puerto Rico ordered his release by order dated April 3, 1986, which resulted from petitioner's petition for certiorari. A request by petitioner to transcribe these trial court proceedings has been denied by the Puerto Rico courts. This is a violation of petitioner's right to due process under the Fifth Amendment of the United States Constitution.

The Supreme Court of Puerto Rico had suspended the right to a Writ of Habeas Corpus in civil contempt proceedings

resulting from child support arrearages which impacted on petitioner's incarceration. This not only violates the United States Constitution regarding the existence of Habeas Corpus Writs, but also violates the Due Process postulates of the Fifth Amendment of the United States Constitution. This allows the Supreme Court of Puerto Rico to incarcerate United States citizens for longer periods of time than result from the expeditious consideration of Writs of Habeas Corpus filed before the Puerto Rico Supreme Court. To allow a citizen to be incarcerated under such conditions is contrary to the United States Constitution.

A one and a half hour notice to appear before the trial court, such as petitioner on March 20, 1986, does not constitute appropriate notice under the

Due Process Clause of the United States Constitution. Petitioner presented uncontroverted evidence before the trial court during his incarceration of his present inability to comply with the court's request for full satisfaction of the amount allegedly owed. The uncontroverted evidence proved that petitioner was terminated from his employment in November of 1984, and that since 1984 had only obtained temporary employment on a week by week basis as a temporary secretary or consultant. Further, the uncontroverted evidence proved that petitioner owned no property except for personal belongings with an inconsequential value.

This court has held that when compliance with a court order is impossible, neither the moving party nor the court has any reason to proceed with

the civil contempt action. U.S. v Rylander, 460 U.S. 752, 757 (1983). This court has further held that to jail one for civil contempt of omitting an act he is powerless to perform would make the proceeding purely punitive, to describe it charitably. Maggio v Zeitz, 333 U.S. 56, 72 (1948). Clearly, to demand the payment of more than $20,000 as a condition precedent to release from jail, when the uncontroverted evidence proves that petitioner could not comply with such a request, is contrary to the mandates of this court. It is clear that civil contempt matters, such as petitioner faces, are the type of case or controversy "capable of repetition, yet evading review" Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

This court has found there is a need

for a prompt decision when constitutional rights and protections are involved. This is is a precept well established by this court. Nebraska Press Assn. v. Stuart, 423 US 1319, 1325 (1975); Nebraska Press Assn. v. Stuart, 423 US 1327, 1328 (1975). There is no greater right protected by the Constitution than the right to freedom. New York Times Co. v. Jascalevich, 439 US 1317, 1319 (1978).

As a result of petitioner's incarceration, third parties were coerced into posting the sum of $7,000 to secure petitioner's release from prison and to guarantee that petitioner would appear at trial. Petitioner was, at all relevant times herein, without employment and without the financial means to pay the sum sought by respondent or to post any funds for his release from prison. The trial court construed this sum as a

guarantee for payment of any sums adjudged to be owed to respondent. The Supreme Court of Puerto Rico affirmed this position in its April 3, 1986 order and reaffirmed this in its order dated April 24, 1987. The sum of $7,000 has been within the trial court's control since on or about April 3, 1986, and unavailable to petitioner's mother and sister. On April 16, 1987, the trial court ordered the $7,000 to be paid to respondent. These funds were ordered to be paid even though no hearing has been held to adjudicate the claims of the parties. The hearing is not scheduled until September of 1987.

Although petitioner presented uncontroverted certified judgments, admitted into evidence, that the matters had been adjudicated by the courts of Virginia in 1980 and 1984, the trial

court denied all requests for petitioner's release from prison and requested, acceding to the requests of respondent, that petitioner's mother and sister provide collateral guarantees for the payment of the $20,000 alleged to be owed.

To require that the release of petitioner be conditioned to the meeting of a demand that third parties provide acceptable compliance with a court order is contrary to the rights under the Constitution. At the least, it is a taking of property without just compensation. It is contrary to law to require compliance by third parties when the person involved is unable to comply.

The release from prison of petitioner should have been granted upon the uncontroverted showing of the impossibility of his compliance with the

order to pay more than $20,000. It is wholly improper to coerce the payment of $7,000 from third parties, at respondent's urging, who knew of the recent butchering of eight prison inmates in the penitentiary where petitioner was incarcerated, and feared for the life and limb of petitioner. These third parties have minimal income and had no legal obligation to provide compliance with the court's order. However, in light of the refusal of the trial court to recognize petitioner's right to immediate release from prison, third parties suffered a taking without just compensation. The third parties were faced with the knowledge that the living and safety conditions in the penitentiary where petitioner was incarcerated were so bad that the United States District Court for the District of Puerto Rico had placed

the penitentiary in the hands of court appointed trustees.

REASONS FOR GRANTING THE WRIT

The Puerto Rico Courts Have Disregarded Provisions of the United States Constitution, particularly the Full Faith and Credit Clause, the Writ of Habeas Corpus, and the Due Process Clause, Matters Which Require This Court's Attention

This court has repeatedly held that it is the final arbiter of rights under the Full Faith and Credit Clause. The trial court of Puerto Rico totally disregarded the cases of this court regarding the Full Faith and Credit Clause which were brought to the trial court's attention and discussed earlier in this petition. The Puerto Rico Supreme Court declined to review the trial court's actions. The judgment of the trial court of Puerto Rico does not even mention any of these United States Supreme Court cases.

Petitioner submits that the United States Constitution and this court's decisions interpreting it are binding on the courts of Puerto Rico. This court should ensure that rights under the constitution are not lost. The trial court of Puerto Rico totally ignored case law precedent of this Court which was brought to the trial court's attention in the request by petitioner for a summary judgment.

If not reversed, the courts of Puerto Rico, and other states, will be allowed to reverse and ignore judgments by the courts of other jurisdictions which could have, and should have, been appealed in the other jurisdiction if a party disagreed with the result. The Courts of Virginia, with jurisdiction over the person and subject matter, adjudicated the controversy in 1980 and

1984 between petitioner and respondent, and respondent did not appeal the adverse decision, a right she possessed.

Issuing the Writ is Necessary Because the Violations of Petitioner's Constitutional Rights Are Capable of Repetition

The rule of law of this Honorable Court to issue this writ of certiorari is found in the cases of Nebraska Press Association v. Stuart, 432 U.S. 1327 (1975), 423 U.S. 1319 (1975), 427 U.S. 539 (1978), New York Times Co. v. Jascalevich, 439 US 1317 (1978), and Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

In the case of Nebraska Press Association v. Stuart, 423 U.S. 1319 (1975) this Court held that:

> "It is apparent, therefore, that if no action on the applicant's application to the Supreme Court of Nebraska could be anticipated before December 1, as the above-described

communication from that court's clerk intimated, a definitive decision by the State's highest court on an issue of profound constitutional implications, demanding immediate resolution, would be delayed for a period so long that day-to-day duration of that delay would constitute and aggravate a deprival of such constitutional rights, if any, that the applicants possess and may properly assert. Under those circumstances, I would not hesitate promptly to act."

In the case of Nebraska Press Association v. Stuart, 423 U.S. 1327, 1328, 1329, 1330 (1975) this Court held that:

"One full week has elapsed since my in-chambers opinion was filed. No action has been taken by the Supreme Court of Nebraska during that week. The clerk of that court has stated, however, that the applicants have been allowed to docket their original application by way of mandamus to stay the order of the District Court of Lincoln County, and that the matter is set for hearing before the Supreme Court of Nebraska on November 25.

Whether the Nebraska court will

reach a definitive decision on November 25, or very shortly thereafter, I do not know. Obviously at least 12 days will have elapsed, without action, since the filing of my in-chambers opinion, and more than four weeks since the entry of the District Court's restrictive order. I have concluded that this exceeds tolerable limits. Accordingly, subject to further action by this Court, and subject to such refining action as the Supreme Court of Nebraska may ultimately take on the application pending before, it, I issue a partial stay....

Where, however, a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment....By deferring action until November 25, and possibly later, the Supreme Court of Nebraska has decided, and, so far as the intervening days are concerned, has finally decided, that this restraint on the media will persist. In this sense, delay itself is a final decision....

Yet neither can I accept that this Court, or any individual Justice thereof, is powerless to act upon the failure of a State's highest court to lift

> what appears to be, at least in part, an unconstitutional restraint on the press. When a reasonable time in which to review the restraint has passed, as here, we may properly regard the state court as having finally decided that the restraint should remain in effect during the period of delay."

In the case of New York Times Co. v. Jascalevich, 439 US 1317, 1319 (1978) this Court held that:

> "...a criminal or civil contempt judgment imposed for refusing to obey the order presents a different consideration. At least where such orders are entered against nonparty witnesses, such as the present applicants, the judgments are "final" for the purposes of appellate jurisdiction within the federal system. They are also final for purposes of this Court's jurisdiction to review state-court judgments if they have been rendered by the highest court of the State in which decision could be had."

The courts of Puerto Rico have already, by their actions and inactions, indicated their position with respect to

petitioner. The courts of Puerto Rico intend to incarcerate petitioner, and other citizens who are without financial means, even while the proceedings are on-going and prior to any adjudication on the merits. Petitioner, upon prevailing with any of his claims and defenses would be exonerated from any obligation to respondent. Further, no contempt or incarceration for contempt could be legally carried out against petitioner. There is more than a possibility that the incarcerations will repeat themselves, not only with regards to petitioner, but with regards to other U.S. citizens that live or may find themselves present in Puerto Rico.

In the case of Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911) this Court held that it would exercise its jurisdiction in matters that

involved a case or controversy that - was "capable of repetition, yet evading review". Petitioner submits that his incarceration before the resolution of his claims is a violation of his rights under the Due Process Clause of the United States Constitution, that it is capable of repetition, and yet in situations similar to the one petitioner is in will evade review, placing petitioner in a position where he will suffer the irreparable injury of losing his liberty and personal freedom for an indeterminate period of time.

After obtaining an order of for release from prison from the Supreme Court of Puerto Rico, petitioner has had to relitigate the two final judgments from the state court of Virginia in the courts of Puerto Rico to no avail.

Issuing the Writ Will Ensure that Arbitrary Decisions in Violation of the Due Process Clause and Other Constitutional Rights Are Corrected

The trial court of Puerto Rico's arbitrary disregard of petitioner's uncontroverted evidence regarding the validity of the Virginia judgments, the propriety of his actions and correctness of his translation as verified by third parties, and lack of means to comply with the requirements of full satisfaction, does not comply with the requirements of the Due Process Clause. These and the acceptance by the trial court of respondent's allegations and reasoning, deprived petitioner of his rights under the Due Process Clause.

This Court Should Enunciate Clear Guidelines for Courts to Follow in Child Support Matters that Have Been Adjudged in Other Jurisdictions to Ensure the Applicability of the Full Faith and Credit Clause.

This Court must ensure that trial courts do not trammel upon the rights of U.S. citizens when courts are pursuing social goals. The United States Constitution's restrictions upon governmental and judicial actions and the rights of U.S. citizens to be protected by the U.S. Constitution must not be eroded. The number of courts that are adjudicating child support matters, the incarceration orders that are being unjustly issued, and the loss of the protections guaranteed by the United States Constitution must be forcefully proscribed by this Court.

In petitioner's case, issues arose during his incarceration by which his rights under the Constitution were ignored by the trial court. The first was the fact that he was incarcerated and held indefinitely without a hearing. The

trial court ordered him incarcerated after a one and a half hour summons to appear, to which petitioner indicated his willingness to appear at a later time with counsel, and which was denied. After summary incarceration petitioner was kept incarcerated notwithstanding raising the fact that the matters had been adjudicated and that he was illegally detained.

In addition, petitioner was required to pay an alleged debt of more than $20,000 even when the uncontroverted evidence was to the effect that he had no property, and could not come forward with this amount of money. Additionally, he was informed that the Supreme Court of the Commonwealth of Puerto Rico had suspended the Writ of Habeas Corpus in cases of child support arrearages.

Further, the trial court, as per the

request of respondent, required that third parties were obliged to guarantee, even when petitioner as the sole responsible party could not guarantee payment, before petitioner could be released from prison. This is violation of the Due Process Clause and the case law of this Court that establishes that a person can not be incarcerated in contempt of a court order when compliance with the court is presently impossible. Petitioner was able to obtain people to guarantee his appearance in court for a hearing but the Puerto Rico courts dissallowed this and required that third parties were obliged to guarantee payment. The trial court stated that respondent had indicated that petitioner's mother, a retiree, should mortgage her only property and residence, in order for petitioner to be released.

This is a taking without just compensation of third party monies under duress. This behavior by the courts of Puerto Rico and any state in violation of the Constitution must be energetically proscribed by this Court through the issuance of this Writ.

This Court should clearly establish that when a person, in petitioner's position, presents uncontroverted evidence of the inability to comply with a court order, incarceration for civil contempt is inappropriate under the United States Constitution. This Court must leave no doubts that the United States Constitution mandates apply to Puerto Rico and the States of the Union and that they do not allow incarceration for civil contempt when compliance is not possible. During petitioner's incarceration, hundreds of persons

similarly situated were also incarcerated in the same prison. During his incarceration, petitioner was informed that one third of the more than fifteen hundred prisoners, were imprisoned as a result of civil contempt orders for child support. All were men, and most of them could not comply with the requirements set by the courts for their release from prison, yet were kept incarcerated.

CONCLUSION

This court should issue the Writ to guarantee and protect the rights of petitioner and others under the United States Constitution.

Respectfully submitted this 14th day of August of 1987.

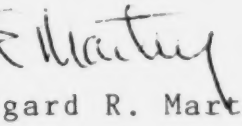
CERTIFICATION OF SERVICE

I hereby certify that on this day I have delivered a copy of this petition to Mr. Juan M. Masini-Soler, Esquire, counsel

for respondent, via certified mail,

return receipt requested, at Box 3367,

Old San Juan, Puerto Rico, 00904.



Edgard R. Martinez

Petitioner - Pro Se

APPENDIX A

THE STATE OF VIRGINIA ¶
¶ ss
FAIRFAX COUNTY ¶

IN THE DISTRICT COURT, JUVENILE AND DOMESTIC RELATIONS, FAIRFAX COUNTY, STATE OF VIRGINIA.

I, Barbara J. Daymde, Court Clerk of Fairfax County, the State of Virginia, do hereby certify that by reason and virtue of being such Court Clerk, I am the legal custodian of and have under my charge and care all of the record books and files of the District Court of Fairfax County, Juvenile and Domestic Relations, that there is no other Clerk of said District Court of said Fairfax County, Juvenile and Domestic Relations, and I do further certify that the above and foregoing is a full, true and correct, and complete copy of Consent Order in Case No. 80841-K,P&Q entitled IN RE: Edgard Martinez, Edgard

Martinez (child) and Gretchen Martinez (child), In the Juvenile and Domestic Relations Court for the County of Fairfax, the State of Virginia, as appears from the records and files thereof.

IN WITNESS WHEREOF, I hereunto set my hand and seal at my office in the City of Fairfax, County of Fairfax, the State of Virginia, on this the 9th day of April, 1986.

(signed)

COURT CLERK OF FAIRFAX COUNTY,

The State of Virginia

THE STATE OF VIRGINIA ¶
¶ ss
FAIRFAX COUNTY ¶

I, Michael J. Valentine, a Judge of the District Court, Juvenile and Domestic Relations, of Fairfax County,

the State of Virginia, do hereby certify that the above named Barbara J. Daymude, by whom the certificate was made, was at the date thereof, Clerk of said Court, duly acting and qualified, and that the said certificate is in due form of law and made by the proper officer and the attached orders are final judgments of this Court.

(signed)

JUDGE OF THE DISTRICT COURT OF FAIRFAX COUNTY, Juvenile and Domestic Relations, State of Virginia

---

THE STATE OF VIRGINIA ¶
¶ ss
FAIRFAX COUNTY ¶

I, Barbara J. Daymude, Court Clerk of Fairfax County, Juvenile and Domestic Relations, the State of Virginia, do hereby certify that the Honorable Michael

J. Valentine, whose name is subscribed to the foregoing certificate, was at the date of making the same, a Judge of said Court, duly elected, and qualified as such, and that his signature to the same is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official Seal at my office in Fairfax, said County and State, this the 9th day of April, 1986.

(signed)

COURT CLERK OF FAIRFAX COUNTY,

The State of Virginia

Attachment I

to

APPENDIX A

Virginia:

In the Juvenile and Domestic Relations District Court for Fairfax County

Commonwealth of Virginia

v. 05-01
Case 080841-K
Their OAT 84-464-s

Martinez, Edgard R.

Defendant

ORDER FOR SUPPORT

This cause came on to be heard this day of , 19 , upon the Petition pursuant to Title 20, Chapter 5.2 of the 1950 Code of Virginia, as amended.

The Court finds Defendant has a duty of support for and based upon the financial needs of said dependents and Defendant's ability to pay, Defendant

is hereby ordered to pay $ per for the support of said dependents commencing .

Further, Defendant is hereby placed on probation for an period of time and must follow these rules:

Defendant must contact his counselor within 5 days of change of address or employment.

Defendant, having agreed to execute wage assignment, assumes full responsibility for keeping said assignment in full force and effect regardless of changes in employment.

Defendant must immediately contact counselor concerning any late or missed payment.

7-5-84 (check mark) Continue 60 days for plaintiff to answer charges made by the defendant. Response must be under oath plaintiff is to attach her pay voucher to

answer.

A COPY TESTE

BARBARA J. DAYMUDE by DEPUTY CLERK

Note on left margin, handwritten (signed)

10-4-84

Dismissed

The defendant is directed to make all support payments to:

Fairfax County Juvenile and Domestic Relations Court, Support Section-4000 Chain Bridge Road, Fairfax, Virginia 22030.

Payments must be by certified check, cashier's check or money order payable to Lydia Lizarribar. Inclued case number on payment.

Your Probation Counselor Frank Sedei can be reached at 691-3241.

Failure to comply with any part of this order will result in the issuance of a

contempt citation and such other penalties as the law provides.

Date Judge

I have received copy of this order

Date Defendant

Attachment II

TO

APPENDIX A

COMMONWEALTH OF VIRGINIA

The Juvenile and Domestic Relations Court of Fairfax County,

THE COMMONWEALTH OF VIRGINIA, at the rel, of

Lydia Lizarribar, 6641 Wakefield Dr. #613, Alexandria, VA Complainant

Edgard Ratael (sic) Martinez, c/o EEOC Room 900, 5203 Leesburg Pike, Falls Church, VA Defendant

TO the Honorable Judge of said Court:

Your petitioner, Lydia Lizarribar, respectfully represents:

1. That on the 21st day of July, 1966, the said defendant, Edgard Martinez, and Lydia Lizarribar (Give Maiden Name) were lawfully married by _____

in the _____ of San Juan, State of Puerto Rico.

2. That on or about the 1st day of August 1979 the said defendant did, without just cause, desert and wilfully neglect and refuse and fail to provide for the support and maintenance of his said wife, and the following male children under the age of seventeen years, to-wit:

Edgard Born 11/5/72

and the following female children under the age of seventeen years, to-wit:

Gretchen Born 7/21/67

and the following children above said ages who are crippled or otherwise incapacitated for earning a living, to-wit:

_____Born_____

such wife, child or children being then and there in necessitous circumstances.

3. That Your Honor has jurisdiction in the premises Sec. 20-61, Va. Code, 1950, as amended in 1954 by reason of the fact:

a. That at the time of desertion such wife, child or children were living in_____

b. That such child or children are now living in_____ in necessitous condition and have remained therein in such condition with the knowledge an acquiescence of said defendant; or

c. That the defendant is now and may be found, living in_____.

4. That the facts and circumstances of the case are as follows: "He has unlawfully failed to provide any support for his children being in necessitous circumstances, since 8/1/79." (20-61)

WHEREFORE, Your petitioner prays that proper process may issue; that the Court

may make all proper and necessary inquiries into the matters herein set forth and enter such judgement or orders in the premises as to the Court may seem meet; and your petitioner will ever prayer, etc.

(signed) Lydia Lizarribar _____
Petitioner sign here Address

_____
Relation to Complainant or Defendant

_____
Date

COMMONWEALTH OF VIRGINIA: TO-WIT.

This day personally appeared before me, Keith True Intake Officer of Court in and for the County and State aforesaid, the above-named petitioner who, upon being duly sworn makes oath that the facts stated in the foregoing petition are true to the best of his knowledge, information and belief.

Given under my hand, this 27th day of August, 1980.

(signed) Keith A. True

Intake Officer

A copy teste: Barbara J. Daymude

By: Deputy Clerk

(Typed on the right hand margin is the following note):

I hereby request permission to withdraw this petition: (signed) Lydia Lizarribar Complainant, 12/09/80

IN THE JUVENILE AND DOMESTIC RELATIONS
COURT OF FAIRFAX COUNTY
COMMONWEALTH OF VIRGINIA
at the rel. of:

_____

vs.

_____

This cause came on to be heard this date upon the petition of desertion and or non-support, the Defendant not being represented by counsel, entered a plea of not guilty, and upon trial the Court does now find the said Defendant not guilty of said misdemeanor.

Further, upon consideration of the circumstances of the case, the Defendant is hereby ordered and directed to pay to _____ the sum of $_____ weekly/ monthly toward the support of his dependents as set forth on the reverse

side, beginning the _____day of_____ 19__ until further order of this court.

Further upon consideration of the circumstances of the case, the Defendant be and hereby is sentenced to the State Convict Road Force at hard labor for a period of_____months.

Upon further consideration the execution of the sentence to the State Convict Road Force is hereby suspended Failure to comply with the terms of the support order or any breach of the peace will cause revocation of the suspension of imposition/execution of sentence.

Given under my hand this ____day of _____, 19_____.

_____, Judge

10/21/80 - Cont. for Defendant & Plaintiff to get financial info. correct presented to Court. Divorce decree indicates alimony only - child support is

to be determined on present needs of the children. (signed by Judge)

12.11.80 dismissed request of complaint. (signed by Judge)

A Copy teste: Barbara J. Daymude

By: Deputy Clerk

APPENDIX B

IN THE SUPREME COURT OF PUERTO RICO

Lydia Lizarribar

Petitioner

Number CE-87-283

vs

Edgard Martinez Gelpi

Respondent

Certiorari

RESOLUTION

Court composed of Chief Judge Pons Nunez and Associate Judges Rebollo Lopez and Alonso Alonso

San Juan, Puerto Rico, May 21, 1987

As to the Petition of Certiorari, the petition is denied.

By agreement of the Court and certified by the Secretary General.

(signature)

Bruno Cortes Trigo

Secretary General

IN THE SUPREME COURT OF PUERTO RICO

MEMBERS OF THE

COURT

ORDER

San Juan, Puerto Rico, May 21, 1987

Due to the non-participation of Associate Judges Negron Garcia, Ortiz, Associate Judge Mrs. Naveira de Rodon and Associate Judge Mr. Hernandez Denton in the case CE-87-283 Lydia Lizarribar v. Edgard Martinez Gelpi, a special tribunal has been convened, made up by Chief Judge Pons Nunez and Associate Judges Rebollo Lopez and Alonso Alonso to hear the case.

Signed and ordered

(signature)

Victor M. Pons Nunes

Chief Judge

Certified by:

(signature)

Bruno Cortes Trigo

Secretary General

I, Irene B. King, Certified Court Interpreter hereby certify this to be a translation of an original document in Spanish into English, done by me on this 10th day of August 1987 to the best of my ability.

Irene B. King

APPENDIX C

IN THE SUPERIOR COURT OF PUERTO RICO

SAN JUAN DIVISION

LYDIA LIZARRIBAR	)	
	)	CIVIL NUM. _
Plaintiff	)	
	)	RF-75-246 (702)
vs.	)	
	)	
EDGARD MARTINEZ	)	In Re
	)	
Defendant	)	DIVORCE (CRUELTY)

RESOLUTION

Present at the hearing to discuss pending matters and motions, are the parties themselves and duly represented by their counsel of record

It is indispensable in order to resolve the controversy concerning the

alimony set in this case, to carry out a detailed study of each and every one of the incidents that comprise the present case.

STATEMENT OF THE CASE

1. The plaintiff filed on January 22, 1975, the cited case on grounds of cruelty which in the part pertaining to alimony stated as follows:

> "5. That the plaintiff requires for herself and her children the sum of Three Hundred Fifty ($350.00) per month in alimony.

2. The defendant responded to the suit on his own behalf in a brief dated January 28, 1975; he accepted each and every one of the allegations in the suit and specifically requested the court to impose the sum of Three Hundred Fifty Dollars ($350.00) per month for alimony.

3. On February 27, 1975, a conciliation meeting took place with the social worker as per Article 97 of the Civil Code of Puerto Rico with the parties concluding that there was no possibility of conciliation.

4. On May 20, 1975, the conciliation hearing took place before the Honorable Ramon Perez De Jesus, with both spouses present with the following decision being rendered as contained in the certification of the conciliation meeting brief signed by Judge Perez De Jesus.

> "The parties agree that upon the rendering of the judgment and as a pendente lite measure the following will be agreed upon:
>
> 1. custody of the two children to the plaintiff.

2. pension: $350.00 per month for the minor children

3. paternal visitation will be agreed upon by the parties.

5. On June 13, 1975, this court rendered a judgment in the cited case in which the matrimonial bond was declared broken and dissolved between the parties.

6. In said rendered judgment, in the part pertaining to alimony, the Honorable Luis Victor Castro Rivera stated the following:

> "The patria potestas and custody of the minor children born of this marriage, to say, Gretchen Camille and Edgard Rafael Martinez Lizarribar, ages seven and three respectively is granted to the plaintiff as well as alimony of Three Hundred Fifty ($350.00) per

month which the defendant agreed to in his reply to the suit."

7. The judgment rendered is registered and filed on June 24, 1975.

8. According to the decrees of the present case from December, 1975, to October 14, 1976, this court heard incidents concerning father-children relations, thus proceeding, finally through a written brief, dated January 14, 1977, to normalize said father-children relations.

9. On February 9, 1977, the plaintiff filed her first contempt motion, alleging that the defendant had not complied with the child support for the minor children born during the marriage.

10. This court scheduled and held a contempt hearing on April 4, 1977,

concluding that the defendant owed, according to stipulations to that effect, the amount of Three Hundred Fifty Dollars ($350.00) commiting himself to satisfying said debt in seven installments of Fifty Dollars ($50.00) each in addition to the regular set allowance of Three Hundred Fifty Dollars ($350.00) per month.

12. The hearing on the motion filed by the defendant took place on January 4, 1978, having come before the court the defendant pro se and the plaintiff represented by counsel of record. The previously mentioned hearing, in other words, the one held on January 4, 1978, showed the following, according to that which the magistrate has been able to confirm upon hearing Miss Migdalia Dominguez, Stenographer of Record, reading the notes taken in stenotype of the entire hearing.

PARTIAL TRANSCRIPT

JUDGE: HON. EDITH PARDO DE VAZEQUEZ

ATTORNEY FOR THE PLAINTIFF:

JOSE MALDONADO CASILLAS

ATTORNEY FOR THE DEFENDANT:

EDGARD MARTINEZ

DATE OF THE HEARING:

JANUARY 4, 1978

STENOGRAPHER OF RECORD:

MIGDALIA DOMINGUEZ ROBLES

MR. EDGARD MARTINEZ:

I understand that the mother of the children has been working or works. During great part of the time that has passed the expenses of the children, from what I can figure, does not exceed the sum of three hundred fifty dollars per month which is the allowance I have been assigned and which I understand as a matter of economic reality, that if said

children are not spending, nor warrant tuition, additional expenses, this amount ..., she is responsible for half of the payment. I understand I have the right and so request it that I be ...,that other right with the obligation I am fulfilling. Those three hundred fifty dollars ($350.00) of allowance that have been paid until now, do not include all the additional expenses I have incurred during the last three years for the childrens' well-being, clothing, shoes, school tuition, at one time a car for the childrens' mother, gasoline, a series of additional expenses that have been substantial in accordance to my means at that given time. At this time, I submit to the court, my financial position does ot allow me to be generous, bountiful, as I had been in the past and I do not have the support for the children. At

this time, financially, from the economic point of view, my position is extremely delicate and embarrassing.

CERTIFICATION

I, Migdalia Dominguez, Stenographer of Record,

CERTIFY: That the proceeding is a partial, true, and accurate transcription of the notes taken by me in stenotype in the case cited on January 4, 1978, before the Honorable Judge Edith Pardo de Vazquez.

I further certify that on this day, September 15, 1986, I am handing the original to the Honorable Angel D. Ramirez Ramirez for use by the court.

(signature) Migdalia Dominguez

Stenographer of Record

14. On November 2, 1978, the Hon. Edith Pardo de Vazquez denied the motion

for revocation of alimony and however reduced the allowance set to Two Hundred Fifty Dollars ($250.00) per month effective November 7, 1977, date on which the defendant filed his motion the allowance set.

15. On May 30, 1979, after a hearing another ruling was handed down in the cited case holding the defendant liable for contempt as of December, 1977, until the date of the hearing September, 1978, and granting him a period of thirty (30) days to pay the amount owed.

16. Through a motion filed on July 13, 1979, the plaintiff verified that the defendant had paid all allowances owed up to and including the month of June, 1979.

17. The proceedings of the cited case were totally stopped from the month of July, 1979, to March, 1984.

18. The plaintiff filed two

motions, the first, a motion to increase alimony, and the second motion requesting a salary attachment.

19. This court issued several orders requiring the plaintiff to amend the briefs in order to provide due process of the law. Said orders were amended and eventually signed by the Hon. Jesus Luis Maldonado.

20. On March 19, 1986, the plaintiff filed a contempt motion which, in summary, alleges the defendant owed the amount of $22,850.00 plus the applicable legal interest up to the date of the motion.

21. The court scheduled a hearing for March 20, 1986, at the 9:00 a.m.

22. The defendant was duly served notice on March 20, 1986, at 7:20 a.m. in San Juan, Puerto Rico.

23. The defendant is an attorney,

duly admitted to practice the profession by the Supreme Court of Puerto Rico.

24. Through an order issued on March 20, 1986, this court ordered the arrest and imprisonment of the defendant for not having been present at the hearing for which he was duly served notice.

25. The same day the arrest order was issued, the marshalls of this court executed said order, proceeding with the arrest and imprisonment of the defendant in the State Penitentiary in Rio Piedras, Puerto Rico.

26. On March 24, 1986, the defendant filed an extensive brief in reply to the contempt motion presenting a large number of events that eventually deserve and will be considered by this court.

27. The defendant alleges in his brief of March 24, 1986, that a Virginia

state court determined that the plaintiff "has no right to claim the allowance, and to that effect, had to begin a procedure claiming 'child support'". The defendant alleges, also, that "The judgment handed down by the State of Virginia created a legal status, whose consequences were to relieve the defendant from paying allowances until a new request for them was filed".

28. In addition to the allegations on the judgments of the Virginia State Court, the defendant maintains that the allowance set in the cited case in Puerto Rico is for the claimant and her children, while in the State of Virginia, for him, the same was a pension for an ex-spouse, in other words, "alimony".

29. After several briefs by the parties, based on decrees, the defendant filed a writ of certiorari, Num. J-0-86-6

before the Supreme Court of Puerto Rico, and said court, in a decision, dated April 3, 1986, ordered the lower court to release the defendant from jail upon making a deposit of $7,000.00 as a guarantee of payment for the amount the defendant owes in alimony.

30. The lower court in an order dated April 4, 1986, released the defendant as he had deposited the sum of $7,000.00 ordered by the Supreme Court of Puerto Rico.

31. On April 28, 1986, the defendant filed a brief entitled "Proceeding for Exequatur and Motion for Summary Judgment".

32. On May 9, 1986, the plaintiff filed an opposition to the motion for Summary Judgment and Exequatur Proceeding.

33. On May 12, 1986, a hearing was

held to discuss the Motion for Summary Judgment and other legal issues relating to the positions of the parties.

Basically, it is the position of the defendant that there exists a judgment issued by the "Juvenile and Domestic Relations District Court of the County of Fairfax, Virginia, on December 11, 1980, that exempts him from the payment of subsistence to his two minor children and thereby requests that this court through a Proceeding of Exequatur give full faith and credit to said judgment. The defendant also maintains that for the purposes of the Virginia Court, the judgment issued in Puerto Rico establishes that the allowances set are for the plaintiff, in other words, "alimony" and that for the purposes of the proceedings in Puerto Rico, the allowances set by the judgment must be

considered for the plaintiff and her children.

The plaintiff understands such judgment does not exist but if it did, it would be null because the court in Virginia was misled by the defendant himself and in addition, is contrary to law of the Commonwealth of Puerto Rico.

In view of the statements of the case mentioned, each and every one of the briefs based on decrees, the certified copy of File 80-841 of the Virginia court and the arguments presented in this hearing, the court hereby renders the following conclusions:

LEGAL CONCLUSIONS

As you can appreciate through examination of the Motion for Proceeding of Exequatur and Summary Judgment, this is based on the foundation that there exists a judgment issued by a court in

Virginia that adjudicated finally and firmly, the controversy over alimony of $250.00 which the defendant was obligated to provide in the cited case. The records of the Virginia court submitted by the defendant himself, show that on August 27, 1980, the plaintiff here Lydia Lizarribar, filed, in Juvenile and Domestic Relations Court of Fairfax County, a brief to the effect that the defendant, Edgard Martinez-Gelpi, was not complying with the order issued by the Superior Court of Puerto Rico granting a monthly allowance of $250.00 for his two minor children.

Having been cited for October 21, 1980, both appeared on their own behalf and argued their respective positions. The plaintiff offered a translation of the divorce decree issued by this court, translated by a translator outside this

controversy. The defendant offered a translation, translated by him. The plaintiff's translation translated "alimentos" as "child support", while the defendant's version translated "alimentos" as "alimony". Apparently, the Virginia court accepted the defendant's version as being a good translation, since a handwritten note in the docket of the case states "....Divorce decree indicates alimony only"; left the case pending and requested additional information. On December 9, 19801, the plaintiff requests permission to withdraw her petition ("I hereby request permission to withdraw this petition."), and on December 11, 1980, the Virginia court granted this request in a note in the docket stating "12-11-80 dismissed request of plaintiff " and some initials. This is the

annotation which the defendant calls a judgment on its merits and is attempting to register it in Puerto Rico through a Proceeding of Exequatur.

The defendant is trying to have this court give full faith and credit to an alleged judgment by a Virginia court, which seen in its most favorable light, incorrectly interpreted the judgment of this court. It corresponds to the Virginia court to give full faith and credit to the judgment of this court.

The jurisprudence as far as dismissal (voluntary dismissal) in the State Courts of common law, as well as in Puerto Rico, is patently clear.

In Kane v. Republica de Cuba, 90 DPR 428 (1966), the Supreme Court of Puerto Rico stated the following:

"It is the absolute right of a plaintiff to withdraw his

action, at any date, unilaterally, and at his will, without prior notification, without an order or judgment from the court where the suit was filed, admitting his withdrawal and without prejudice as long as said action is not a class action suit, and the withdrawal be executed before notification of a motion for summary judgment or of the reply"

Although we understand that in the Virginia controversy the fact that the defendant presented a translation of what he alleged was a divorce decree this does not constitute a "response". If it were, voluntary dismissal would still be in effect with the approval of the court according to De la Matta vs. Carreras, 92

DPR 85 (1965).

> "After defending a suit for a defendant to withdraw from the suit, he needs to obtain permission from the court, through a regular motion and he must, at the time he announces his withdrawal, impose those conditions that will result convenient in accordance to the circumstances of the litigation".

The records of the Virginia court show that the plaintiff in a regular motion, requested and obtained said permission and, also, no conditions were imposed when the dismissal was decreed.

The Virginia court's determination concerning voluntary withdrawal is in line with the practice adopted in Virginia since 1789 (sic) and is

discussed in Moore v. Moore, 240 S.E.2d 535, Supreme Court of Virginia, 1978, and reads to the effect that "Every person desirous of suffering a nonsuit on trial, shall be barred thereof, unless he do so before the jury retire from the bar." This statute (Code s 8.01-380 (a), actually reads: "A party shall not be allowed to suffer a nonsuit unless he do so before the jury retire from the bar or before the suit or action has been submitted to the Court for decision by the Court". (Emphasis added).

From the Virginia court's records it is clear that this controversy had NOT been submitted to the court for its decision. On the contrary, the case was opened because the court had requested additional financial information from the parties.

So being the situation, the only

thing that remains to be clarified is the status of the annotation by the Virginia court of October 21, 1980, to the effect that "divorce decree (the one in Puerto Rico) indicates alimony only." Without, at the moment, going into the merits of said determination it suffices to point out that state jurisdictions of common law recognized that voluntary dismissal operates in such a fashion that the parties remain in identical situations as to the moment prior to the beginning of the suit that is being voluntarily dismissed, as pointed out in:

> Brackenridge vs. State, 11 S.W. 630 (Texas). "As a matter of general definition, a dismissal is an order for the termination of a case without a trial on any of its issues."

A.B. Dick Co. vs. Marr, 197 F

2498 (New York). "Dismissal of an action by the plaintiff generally operates to annul orders, rulings, or judgments previously made in the case. Thus, there can be no ancillary proceedings to enforce an interlocutory order made in the dismissed suit".

27 C.J.S. "Dismissal & Nonsuit 39"... "A voluntary nonsuit, dismissal or discontinuance is a final determination of the action and there remains no cause pending in which...defendant may thereafter file an answer or plea...A dismissal or nonsuit leaves the situation though no suit had ever been bought, and

it has the effect of any absolute withdrawal of the claim and leaves defendant as though he had never been a party. It carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and of defendant..." (Emphasis added).

Federal Rules of Civil Procedures, Rule 41(a)(2) ..."Unless otherwise specified in the order, a dismissal under this paragraph is whithout (sic) prejudice."

As expressed previously, this court CANNOT accept the argument of the defendant that there exists a judgment by a Virginia court that exonerates him from complying with the obligation of

providing a subsistence allowance for his two minor children, as decreed by this court.

On the contrary, we accept the arguments of the plaintiff that such judgement does not exist and, if it existed, it would not be recognized in this jurisdiction as in the case of Efectos Litograficos,C.A. vs. National Paper & Type Company of Puerto Rico, Inc., 112 DPR 389 (1982), because it is contrary to public order, to the basic principles of justice and for having been obtained through fraud. We make ourselves clear. It is, in this jurisdiction, contrary to public order and to the basic principles of justice that a father, who has the necessary means to help feed his minor children and,while the need exists for them to be fed, he be exonerated from providing such

food. See the general case law: Codigo Civil de Puerto Rico, 1930, Articles 142 to 151; Ada Olga Mundo vs. Francisco Cervoni, 115 DPR 422; Elsie Awilda Martinez vs. Gilberto Rivera Hernandez, CA-85-14: Carlos Key Nieves vs. Isabel Oyola Nieves, CA-85-23; Pedro Otero Fernandez vs. Alguacil Tribunal Superior, CA-85-74 and Wilma Quinones vs. Baltazar Jimenez Conde, CA-86-15.

The defendant, who is an attorney, admitted to practice in this jurisdiction, upon having translated the judgement for subsistence of this court as "alimony" instead of "child support" when he knew that it was not even so (we will explain this further on) nor in our own law could it be so, this constitutes a behavior that goes beyond that which is a fraud before the court. Therefore, it is concluded that this conduct of

inducing the Virginia court to err, constituted fraud on said court which would fully justify that said judgment of said court, if it exists, not be recognized in this jurisdiction.

We mentioned previously that the respondent knew that the allowance set in the case cited was ALWAYS to the benefit of his two minor children.

The defendant, on May 20, 1975, accompanied by the plaintiff, appeared before the Hon.Ramon Perez De Jesus in order to comply with the technicalities of the Conciliation Hearing as required by law. During that meeting the defendant accepted the allowance to be set, in the amount of $350 per month, was to benefit his minor children, both for the allowance pendente lite as well as for the judgement that was to be issued. (See statement of the case number 4 and

brief of attest of Conciliation Hearing in decrees signed by the Hon. Juan Perez De Jesus).

In order to be totally convinced that the defendant's determination, as far as the pension being for the benefit of his children, we undertook the task of holding a hearing on January 4, 1978, which was held due to the defendant's request to revoke the allowance set. The defendant clearly, upon referring to the allowance set at $350.00 per month, establishes that the same was for his childrens' expenses (See statement of case number 13 and partial transcript in decrees).

The obligation of fathers to provide subsistence to their children has been and will be guaranteed by our courts. The obligation to provide subsistence has, as its foundation, the material

right to life. (F. Puig Pena, 5 Compendio de Derecho Civil Espanol, 492 (Third Edition, 1976).

Our Supreme Court in Milan Rodriguez vs. Munoz, 110 DPR 610, (1981) expressed the following:

> "The duty of providing subsistence is based on recognized universal principles of human solidarity, generated by the natural right to life and imperative for family ties."

In line with the previous Statements of the Case and Opinions, the Court resolves as follows:

RESOLUTION

1. Denies the Motion for Summary Judgment filed by the defendant on April 28, 1986.

2. Denies the request for Exequatur

filed on April 28, 1986.

3. Concludes that the allowance set in the present case has been and is for the benefit of the two children borne of both parties.

4. Concludes the defendant is up-to-date with his monthly allowance payments of $250.00 up to and including June 1979.

5. The defendant is given a period of (thirty) 30 days to file a report, under oath, in which he outlines each and every one of the credits requested in his motion of March 23, 1986 and fifteen (15) days for the plaintiff to file a response.

6. Both parties are granted a period of forty-five (45) days to use the mechanisms of discovery. The parties will have to provide copies of their tax returns for 1986.

7. Both parties are granted a period of

forty-five (45) days to submit an income and expense statement, under oath. To this report, there must be attached evidence to substantiate each and every entry claimed as an expense. (Example: copies of cheques, invoices, work verification of the parties and their spouses, certificates from universities or schools for the children, etc.)

5. A "Status Conference" is scheduled for May 5, 1987 at 10:00 a.m.

9. A hearing to argue the Contempt Motion filed on March 19, 1986 and the Motion to Revoke Alimony filed by the defendant on March 24, 1986, is scheduled for May 12, 1987 at 9:00 a.m.

10. The defendant is granted a period of twenty (20) days to present reasons for why we should not dispose of the assigned allowances earmarked in the case of decrees, exceeding the amount of

$7,000.00 (seven thousand dollars), ordering their immediate delivery to the plaintiff. After the period previously granted expires, we will dispose of said allowances according to law.

11. The terms granted in this Resolution will be effective on the date of notification of same.

BE IT NOTIFIED:

San Juan, Puerto Rico, March 16, 1987.

(signature)

Angel D. Ramirez Ramirez

Superior Court Judge

I, Irene B. King, Certified Court Interpreter, hereby certify this to be a translation into English of the original text written in Spanish done by me on the 10th day of August, 1987, to the best of my ability.

Irene B. King